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No. 10-244

IN THE
Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

v.

CHUBB INDEMNITY INSURANCE COMPANY *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF BRADY C. WILLIAMSON, *AMICUS CURIAE,* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Brady C. Williamson moves the Court for leave to submit this brief as *amicus curiae*, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, in support of the petition for certiorari in Case No. 10-244. The petitioners and one respondent, Common Law Settlement Counsel, have provided written consent to the filing of this brief. Respondent Chubb Indemnity Insurance Company ("Chubb") has declined to give its consent, necessitating this motion.

Chubb's stated reason for refusing consent is Rule 37.2(a) of the Rules of the Supreme Court of the United States requiring that an *amicus* "ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least ten days prior to the due date for the *amicus curiae* brief...." However, the purpose of the ten-day notice requirement, added to the Supreme Court Rules in 2007, is to give respondents an opportunity to seek an extension of time to file their briefs to address any arguments advanced in the *amicus* brief. *See* Eugene Gressman, et al., *Supreme Court Practice*, § 6.40 (9th ed. 2007), *citing* Clerk's Comments to the 2007 Rules.

Chubb already has obtained—notably, with the Petitioners' consent—an extension of time to file its response to the Petition for Writ of Certiorari. *See* August 27, 2010 Order Extending Time to File Response to Petition to and Including October 20, 2010. Chubb, therefore, will have ample ability to

respond—if it wishes—to any arguments raised in the *amicus* brief.

In addition, the ten-day notice deadline expired on September 10, 2010. Counsel for the *amicus* was not able to begin preparing the brief until September 13, 2010. Counsel sought permission from counsel for Chubb the same day, just one business day after the ten-day deadline. Under the circumstances, strict procedural compliance was not possible. In the absence of prejudice to any party of record, the *amicus* asks the Court to deem his substantial compliance with the notice requirement sufficient to permit acceptance of the attached brief.

Dated: September 20, 2010.

Respectfully submitted,

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BRIEF OF BRADY C. WILLIAMSON, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

Brady C. Williamson submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of the petition for a writ of certiorari in Case No. 10-244.

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae is a constitutional and bankruptcy litigator in practice in Madison, Wisconsin. He has represented a broad array of private and public sector clients in significant bankruptcy proceedings and has taught, periodically, at the University of Wisconsin Law School for more than 25 years. Mr. Williamson is a member of the National Bankruptcy Conference, the American Bankruptcy Institute, and the American College of Bankruptcy and serves as the court-appointed fee examiner in the General Motors Chapter 11 proceeding, *In re Motors Liquidation Corp.*, No. 09-50026 (Bankr. S.D.N.Y. filed June 1, 2009).

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. The law firm in which the *amicus* is a shareholder has, in the past, represented the petitioners and affiliates in wholly unrelated appellate and insurance coverage matters in Wisconsin state court proceedings. The *amicus* party's prior representation of the petitioner has not involved in any way the subject matter of this appeal, specifically, or bankruptcy matters, generally. *See, e.g., Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2005 WI 26, 279 Wis. 2d 4, 694 N.W.2d 320.

In 1996, the President of the United States appointed Mr. Williamson to chair the National Bankruptcy Review Commission, which submitted its 1,300-page report to Congress, the Chief Justice of the United States and the President on October 20, 1997. The report, entitled *Bankruptcy: The Next Twenty Years: National Bankruptcy Review Commission Final Report*, offered more than 170 recommendations for bankruptcy law and procedure. These recommendations included five proposals explicitly addressing mass tort future claims. At their core, these recommendations rely upon the channeling injunction as a mechanism to provide equality of distribution to claimants—past, present or prospective—while guaranteeing debtors the finality and fresh start reorganization that is the promise and premise of the United States Bankruptcy Code.

The purpose of this brief is to address, not from the perspective of any participant but from a policy perspective, matters that bear on the Court's determination of a critically important issue of bankruptcy law: the finality and enforceability of the channeling injunction to permit the equitable treatment of both claimants and debtors.

Amicus Curiae has been involved in a number of bankruptcy cases before this Court, including *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and, *Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (argued).

ARGUMENT

Nearly twenty-five years ago, the U.S. Bankruptcy Court for the Southern District of New York pioneered the treatment of mass tort future claims in Chapter 11. It confirmed a reorganization plan (the "Manville Plan") that achieved a delicate balance between the debtor's legitimate need for finality and the rights of claimants—past, present, and future—to equitable treatment under the plan. As its centerpiece, the Manville Plan established an insurance-funded trust to settle thousands of disputed claims and an injunction protecting the debtors and their insurers from all claims arising from prepetition asbestos exposure. *See In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), aff'd, 78 B.R. 407 (S.D.N.Y. 1987).

Like many historic legal developments, the statutory and constitutional propriety of the Manville Plan and its trust mechanism were litigated extensively and affirmed in a final, non-appealable judgment. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988). The U.S. Court of Appeals for the Second Circuit affirmatively held then that "all...interested parties were provided with notice and a hearing before the [Manville Plan] was approved," and the notice "met the requirements of due process" necessary to render

the plan confirmation order final and nonappealable. *Id.* at 94.[2]

This Court's decision in *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205-06 (2009) ("*Bailey*"), should have been the final chapter, foreclosing the repeated attempts to evade the injunction's judicially-defined reach. Thwarting third parties' attacks on the injunction, this Court held that the Manville Plan's channeling injunction "became final on direct review over two decades ago.... [W]hether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008." *Bailey*, 129 S. Ct. at 2203.

That should have ended the matter. It did not. This appeal presents yet another collateral attack on the channeling injunction, ignoring the principles of supremacy and finality.

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[2] The doctrine of equitable mootness, which has developed over the last 20 years, suggests that it is simply too late for a party to challenge—indirectly or otherwise—a plan of reorganization that has been substantially consummated. *See, e.g., In re Paige*, 584 F.3d 1327, 1339 (10th Cir. 2009) (citing six-factor test for equitable mootness, including whether the "public policy need for reliance on the confirmed bankruptcy plan—and the need for creditors generally to be able to rely on bankruptcy court decisions—[would] be underminded by reversal of the plan."); *see also In re Blast Energy Servs.*, 593 F.3d 418 (5th Cir. 2010); *In re Source Enters. Inc.*, 392 B.R. 541, 547 (S.D.N.Y. 2008) ("The doctrine is therefore invoked to avoid disturbing a reorganization plan once implemented, and can be applied in two situations: [w]hen an unstayed order has resulted in a comprehensive change in circumstances, and when a reorganization is substantially consummated.") (internal quotation and citation omitted).

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895).

Though this Court in *Bailey* concluded it was improper for the Second Circuit to revisit the bankruptcy court's jurisdiction 20 years later, the Court of Appeals nonetheless did so again. Moreover, when it reached the narrow notice question presented on remand, the appellate court refused to honor its own precedent finding that notice of the Manville Plan was adequate.

Setting aside the Second Circuit's refusal to honor this Court's mandate in *Bailey*, the decision violates the fundamental principles of fairness and finality underlying what is now section 524(g) of the U.S. Bankruptcy Code.[3] That violation stems, at least in part, from the Circuit Court's new insistence

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[3] Though section 524(g) of the Bankruptcy Code was enacted after the Manville Plan's affirmance on direct appeal, the code itself "and the legislative history make clear that the provisions of section 524(g) are to apply to cases—like Johns-Manville—in which there already existed an injunction that met the requirements set forth in that section." 4 *Collier on Bankruptcy* ¶ 524.07[4] (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2010); *see also* 140 Cong. Rec. H10765-66 (daily ed. Oct. 4, 1994) (section 524(g) "is written, however, so that Johns-Manville and UNR, both of which have met and surpassed the standards imposed in this section, will be able to take advantage of the certainty it provides without having to reopen their cases").

that the adequacy of Chubb's notice, so long ago, of the Manville Plan's injunction provisions should be viewed through the lens of Rule 23 of the Federal Rule of Civil Procedure.

The National Bankruptcy Review Commission addressed and declined to adopt the proposed application of Rule 23 principles for managing mass claims in Chapter 11. After extensive hearings and research, the Commission's recommendations were unequivocal:

> [T]here remain substantial apprehensions about the ability of Rule 23 class actions to establish adequate rules to deal with mass future claims. Indeed, the very aspects of bankruptcy that make it an anathema to some lawyers, with rules requiring collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case, make bankruptcy more protective of future claimants [than Rule 23 standards] because it is a forum that mandates scrutiny of all arrangements. The fundamental structure of the bankruptcy system, with restrictions such as the "absolute priority rule," provides safeguards for the interests of mass future claimants that are unmatched in the class action system. Bankruptcy is designed to give more claimant protection, and therefore to yield fairer and more equitable

results, than Rule 23 mandatory settlements.

Bankruptcy: The Next Twenty Years § 2.1.2, at 339-41; *see also Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 n.16 (1997) (addressing levels of scrutiny required for "absentee" claims in class action settlement context).

Though of paramount importance, it is not only the debtor's interest in finality at stake. Indeed, the equitable treatment of future claimants is threatened if channeling injunctions in Chapter 11 are subject to the same standards as class action settlements. Without the assurance and finality that the injunction mechanism provides, insurers will have little incentive to fund mass claimant trusts--thus limiting the availability of meaningful remedies for claimants with latent injuries and claims.

Ever since the U.S. Court of Appeals finally confirmed the Manville Plan in 1988, *MacArthur*, 837 F.2d 89, debtors, trustees, claimants, and insurers have relied upon the procedures approved there to administer and pay hundreds of millions of dollars, if not billions, in claims. Participants—and courts—have had rules that were certain, reliable, predictable in their application, and concrete. The Second Circuit's latest decision has unjustifiably cast the entire system into doubt. This judicial policy-making demands, once again, this Court's intervention.

The Bankruptcy Code gives the bankruptcy court extraordinary power. That power begins with

an automatic injunction, *see* 11 U.S.C. § 362, and the comprehensive authority of section 105(a) (all authority "necessary or appropriate to carry out the provisions of this title"). It includes the power to estimate claims (§ 502(c)) and create trusts *(see, e.g., Holywell Corp. v. Smith,* 503 U.S. 47, 55 (1992), *citing* § 1123(a)(5)(B)). In the pending *General Motors* reorganization, for example, the Debtors have filed a Plan of Reorganization calling for the funding of three trusts, by definition with finite assets, for the administration of a potentially infinite set of current and future claims, including asbestos-related claims. *In re Motors Liquidation Corp., supra,* p. 1, August 31, 2010 Joint Plan of Reorganization [Docket No. 6829].

The trust channeling mechanism offers a delicate balance between the competing interests that underlie any Chapter 11 confirmation process. All corporate reorganizations that attempt in good faith to anticipate future claims relying on trust channeling—and the claimants who have benefitted from them—are in jeopardy if the Second Circuit's view prevails. The petition should be granted and the Second Circuit, once again, reversed.

CONCLUSION

This petition for a *writ of certiorari* presents issues of significance for parties well beyond those named in the case caption. The Circuit Court's decision threatens the flexibility and integrity of the bankruptcy system, jeopardizing the code-based and common law rights of debtors and claimants and ignoring the constitutional delegation of authority

underlying the statute. The Court should grant the petition.

Dated: September 20, 2010.

Respectfully submitted,

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